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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1482

TELECO, INC., a corporation,
Petitioner,

VERSUS

SOUTHWESTERN BELL TELEPHONE COMPANY,
a corporation,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW BY THE PETITIONER

The Petition for Writ of Certiorari filed herein presents three questions for review. None of these questions set forth "special and important reasons" as required by Rule 19.1 of the Rules of this Court. The Petition for Writ of Certiorari should therefore be denied.

Of the three questions presented for review by Petitioner, only one, Question A, expresses an issue which was involved in the case below, and even then the question is not expressed in the context of the case. Further, the issue posed by Question A, namely whether the action taken by a state regulatory agency with regard to a tariff of a public

utility corporation constitutes "state action" for the purposes of due process requisites under the Constitution of the United States, has recently been resolved by this Court in the case of *Jackson* v. *Metropolitan Edison Company*, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974), adverse to the position of Petitioner herein.

The Petitioner's Questions B and C are violative of the rules of this Court. Such questions are not "expressed in the terms and circumstances of the case," as required by Rule 23.1(c). Question B was not involved in the decision rendered by the Court of Appeals. There was no adjudicatory state action by any state agency involved in the case below. Question B attempts to state an issue which begs the "state action" issue recently decided in the *Jackson* case, *supra*, and which was not involved in this case.

Under the terms and circumstances of the case, Petitioner's Question C is not properly raised for consideration by this Court. The Petitioner's contentions regarding the need and justification for the intrastate tariff provisions the Petitioner seeks to overturn by a collateral judicial attack are within the primary and exclusive original jurisdiction of the Corporation Commission of Oklahoma by virtue of Art. IX, Sections 20 and 24 of the Oklahoma Constitution. These regulatory matters are not within the original subject-matter jurisdiction of the District Court of the State of Oklahoma or the federal district courts, sitting in diversity jurisdiction and the tariff provisions may not be collaterally attacked under the laws of Oklahoma.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND TARIFFS INVOLVED

The Petitioner has omitted pertinent provisions of the Oklahoma Constitution and made reference to other provisions which were not at all involved in this case. The omitted constitutional provisions are:

1. Oklahoma Constitution, Art. IX, Section 20 (Appendix A, pages i-ii).

2. Oklahoma Constitution, Art. IX, Section 24 (Appendix B, pages ii-iii).

RESPONSE TO PETITIONER'S STATEMENT OF CASE

Petitioner's statement of the case contains many inferences and omits material facts. The Petitioner's Statement of Case departs significantly from the case actually presented to the District Court. The Petitioner suggests, infers and finally states to this Court that the case below involved not only a claim based on alleged breach of contract for telephone service and an alleged conversion of Petitioner's telephone equipment, but also issues of restraint of trade or unfair competition.

The Petitioner's attempt to inject a restraint of trade issue or even such a flavor into this case is not only without support in the record of this case, such claims were expressly repudiated by the Petitioner before the District Court during argument on Respondent's Motion for Summary Judgment (R. Vol. II, p. 12):

"THE COURT: Is there any other basis for your claim against the defendant except breach of contract and conversion?

"MR. PATE: No, sir.

"THE COURT: What about restraints of trade?

"MR. PATE: No, sir, that is not our theory in this litigation.

"THE COURT: You do not rely on restraint of trade?

"MR. PATE: No, sir, we do not."

(Also see: R. Vol. II, pp. 24-25.)

There was no element or aspect of unfair competition asserted in this case as it was presented to the District Court by the Petitioner and such supposed issue is now unfairly suggested by Petitioner to have been an issue below when it clearly was not because the Petitioner expressly repudiated it in the District Court.

This case arose when the Petitioner connected its privately-owned telephone system to the telephone network of the Respondent, in a manner the Petitioner knew was prohibited by the tariffs on file with and approved by the Oklahoma Corporation Commission and obtained telephone services from the Respondent without paying the required tariff charges.

The Respondent gave written notice to the Petitioner of its violation of the contract of service; demanded compliance by the Petitioner with the tariff provisions; and, advised Petitioner that, if the tariff violations did not cease within ten days, telephone service would be interrupted

until such time as the Petitioner agreed to comply with the requirements of the tariff.

Repeated requests by the Respondent for Petitioner to comply with the tariff provisions were ignored until the Respondent discontinued telephone service to the Petitioner. Such interruption of service continued only until the Petitioner agreed in writing to abide by the terms of the filed tariff.

The Petitioner filed an Application with the Oklahoma Corporation Commission the second business day after service was discontinued to it and raised questions regarding the necessity and propriety of the tariff provisions which the Petitioner had breached. Hearing was promptly scheduled on such application by the Oklahoma Corporation Commission. Before the matter was heard the Petitioner dismissed its application before the Corporation Commission on its own motion. Petitioner has not sought to avail itself of the original and primary jurisdiction of that agency, in the context of this dispute, since that time.

The United States District Court for the Western District of Oklahoma entered summary judgment in favor of Respondent on Petitioner's Complaint, which alleged breach of contract and conversion. The United States Court of Appeals for the Tenth Circuit affirmed this summary judgment for Respondent.

RESPONSE TO PETITIONER'S STATED REASONS FOR GRANTING THE WRIT

The Petitioner states (Petition p. 9) that the Tenth Circuit Court of Appeals has decided an important federal question in a way that conflicts with the applicable decisions of this Court.

This is not true.

In the terms and circumstances of this case, when it was presented by the Petitioner to the District Court, the only federal question which had any possible substance was whether or not an interruption of service to a utility customer, pursuant to the terms and conditions of a tariff filed with a state regulatory agency amounted to "state action" for due process purposes under the 14th Amendment. This was an illusory issue under the undisputed facts of this case because the Petitioner had reasonable advance notice and the opportunity for a hearing if it desired to seek one before the state regulatory agency, the Oklahoma Corporation Commission. The Federal District Court so found (Petition, Appendix A, p. x).

The Tenth Circuit Court of Appeals decided this case in accordance with the principles set forth by this Court in the recent decision in *Jackson* v. *Metropolitan Edison Company, supra,* and "due process" was mooted. Nonetheless, in this case the Petitioner has admitted receiving advance notice of the intended interruption of service, unless compliance with the tariff was obtained, and had plenty of time to obtain a hearing if it wanted it.

Even if "state action" had been involved in this case, the requirements of due process were met in all particulars.

The Petitioner incorrectly asserts that the Court of Appeals' decision conflicts with decisions of this Court.

ARGUMENT AND AUTHORITIES

The Petitioner recognizes that this Court recently decided the *Jackson* v. *Metropolitan Edison Company* case, *supra,* in which it held that "state action" was not involved in the interruption of service to a utility customer and rejected the contention that the requirements of due process applied to a termination of service by a utility company.

The Petitioner seeks to distinguish the *Jackson* case from the instant case by suggesting that in *Jackson* the utility did no more than enforce its right to reasonable compensation. This begs the question because had "state action" been involved the utility's termination of service for any reason as authorized by its tariff would have required the due process notice and an opportunity for hearing if the termination was not to be wrongful.

In the instant case, when the Respondent finally resorted to termination of service the Petitioner was appropriating telephone service without paying the tariff charges specified therefor and was trespassing by making a connection to the Respondent's telephone system in violation of the terms and conditions of service specified by the tariff. Nonetheless, in this case, the Respondent provided advance written notice to the Petitioner of the tariff violations, the requirements to get in compliance with the tariff and then gave the Petitioner about two weeks within which it could either get in compliance or seek a hearing before the Oklahoma Corporation Commission. The Okla-

homa Corporation Commission has original and exclusive primary jurisdiction over the tariff terms and conditions of service of the Respondent to which the Petitioner took exception and intentionally breached. In this case, as distinguished from the *Jackson* case, had there been "state action" in the termination of service to the Petitioner, the requirements of due process were fully satisfied by the actions of the Respondent.

The District Court found:

> " * * * it is admitted that the defendant gave prior notice to plaintiff before termination. The Court finds that the notice as specified and the time period prescribed therein were reasonable as a matter of law." (Appendix to Petition, p. x.)

The Petitioner knew exactly where to contest the reasonableness of and necessity for the tariff provisions, it took exceptions to and the rates and charges for the telephone service it wanted and appropriated. In fact, as noted by the District Court ("Note" to Footnote 2, District Court's Opinion, Appendix to Petition, p. ii), the Petitioner actually filed an application invoking the jurisdiction of the Oklahoma Corporation Commission on allegations alleging that the tariff provisions relied upon by the Respondent were unreasonable, discriminatory, unnecessary and required the payment of excessive charges for services rendered.

This Application was dismissed on Petitioner's own motion, for reasons known only to the Petitioner. The questions regarding the tariff which the Petitioner raised before the state regulatory agency concerned with primary jurisdiction over such matters have not been reasserted in that

forum by the Petitioner as of this date. When the Petitioner states on page 10 of its Petition: "In the present case, termination was utilized to enforce what Petitioner feels to be an unconstitutional gratuity conferred upon Respondent by the Oklahoma Corporation Commission." What the Petitioner is urging—but not saying—is that the Oklahoma Corporation Commission should have disapproved the tariff the Petitioner disagrees with and the charges for service which the Petitioner does not believe are reasonable. These arguments were properly deferred by the District Court to the primary jurisdiction of the Corporation Commission (Okla. Const. Art. IX, §§ 20, 24).

The Petitioner's position that Respondent's only interest in tariff provisions such as those involved in this case should be based solely upon a desire to preserve the integrity of its system is an argument which, under the primary jurisdiction of the Oklahoma Corporation Commission, must be presented to that agency and not to the District Court.

The Petitioner went to the proper forum with its dispute and elected not to proceed with the Application it filed before the Oklahoma Corporation Commission.

The contentions of the Petitioner set out on pages 14 and 15 of its Petition must be advanced before the agency with original primary jurisdiction and not before the Oklahoma District Courts or to the Federal District Court sitting in diversity in such a case which are required by the Constitution of that State, Art. IX, Sections 20 and 24, to defer such issues to the expert regulatory agency created to administer and regulate such matters in the State of Oklahoma.

The tariff constitutes a contract for service between the parties. The terms and conditions of that contract may not be collaterally attacked, suspended or avoided by a court in any proceeding brought by either party to such contract. *Ambassador, Inc., Washington-Annapolis Hotel Company, et al.* v. *United States of America, American Telephone & Telegraph Company, et al.*, 325 U.S. 317, 65 S.Ct. 1151, 89 L.Ed. 1637 (1945), *rehearing denied* 325 U.S. 896, 65 S.Ct. 1561, 89 L.Ed. 2006 (1945); *Carrington* v. *Sunland-Tjunga Telephone Co.*, 263 F.2d 568 (9th Cir. 1959), *cert. den.* 359 U.S. 975, 79 S.Ct. 893, 3 L.Ed.2d 841 (1959).

Where a telephone company has discontinued or interrupted service to a customer because of the customer's continuing violation of the company's filed tariff after reasonable advance notice has been given to the customer by the telephone company, the telephone company is not liable for damages alleged to have resulted from the discontinuance of service. *Pollin* v. *Diamond State Telephone Co.*, 386 F.Supp. 86 (U.S.D.C., Del. 1968); *Plate* v. *Southern Bell Telephone & Telegraph Company, Inc.*, 98 F.Supp. 355 (E.D. S.C. 1951).

A customer of a telephone company who has obtained service in violation of the tariff has no right to receive such service and cannot recover damages for having such service interrupted.

The telephone company has no duty to provide service unless and until the customer agrees to accept the service in accordance with the terms, conditions and charges specified as being applicable thereto by the filed and effective tariff of the company. *Jackson* v. *Metropolitan Edison Company, supra.*

The Petitioner's willful violation of the tariff prescribed terms and conditions of service and its refusal to pay tariff rates and charges for the service desired gave the Respondent an undeniable right to interrupt Petitioner's unauthorized appropriation of telephone service. Cf. *Digiacomo* v. *Diamond State Telephone Co.*, 356 F.Supp. 1063 (D.C. Del. 1973).

CONCLUSION

There was no "state action" or denial of due process worked upon this Petitioner under the facts of this case. The Petition for a Writ of Certiorari should be denied.

WAYNE E. BABLER and
WILLIAM C. SULLIVAN
1010 Pine Street
St. Louis, Missouri 63101

Attorneys for Respondent

June, 1975

APPENDIX "A"

OKLAHOMA CONSTITUTION, ART. 9, §20

§ 20. Appeals to Supreme Court—Other courts to have no jurisdiction—Mandamus and prohibition

From any action of the Corporation Commission prescribing rates, charges, services, practices, rules or regulations of any public utility or public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, an appeal may be taken by any party affected, or by any person deeming himself aggrieved by any such action, or by the State, directly to the Supreme Court of the State of Oklahoma, in the manner and in the same time in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right, and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the public utility or public service corporation affected by any such action, the State of Oklahoma shall be made the appellee, but in other appeals hereunder, the public utility or public service corporation affected shall be made the appellee.

An appeal from an order of the Corporation Commission affecting the rates, charges, services, practices, rules or regulations of public utilities, or public service corporations, shall be to the Supreme Court only, and in all appeals to which the State is a party it shall be represented by the Attorney for the Corporation Commission, and the Attorney General, or his duly authorized representative.

The Supreme Court's review of appealable orders of the Corporation Commission shall be judicial only, and in all appeals involving an asserted violation of any right of the parties under the Constitution of the United States or

the Constitution of the State of Oklahoma, the Court shall exercise its own independent judgment as to both the law and the facts. In all other appeals from orders of the Corporation Commission the review by the Supreme Court shall not extend further than to determine whether the Commission has regularly pursued its authority, and whether the findings and conclusions of the Commission are sustained by the law and substantial evidence. Upon review, the Supreme Court shall enter judgment, either affirming or reversing the order of the Commission appealed from.

No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.

APPENDIX "B"

OKLAHOMA CONSTITUTION, ART. 9 §24

§ 24. Rights of action not affected—Questioning action of commission

The right of any person, firm, corporation, receiver or trustee to institute and prosecute in the ordinary courts of justice, any action, suit or motion against any public utility, or public service corporation, or any individual, person, firm, corporation, receiver or trustee, engaged in the public utility business, shall not be extinguished or impaired by

reason of any fine or other penalty which the Corporation Commission may impose or be authorized to impose upon such public utility, public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, because of its breach of any public duty or because of its failure to comply with any order or requirement of the Corporation Commission; but in no such proceeding by any person, firm, corporation, receiver or trustee, against such public utility, public service corporation, or any individual, person, firm, corporation, receiver or trustee engaged in the public utility business, nor in any collateral proceeding, shall the reasonableness, justness, or validity of any rate, charge, service, practice, rule, regulation or requirement, theretofore prescribed by the Corporation Commission within the scope of its authority, and then in force, be questioned.

CERTIFICATE OF SERVICE

Service was made upon Petitioner in accordance with Rule 33.1 of this Court's Rules, by mailing three copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari, air mail, postage prepaid, addressed to James R. Eagleton, Esq., P. O. Box 692, 325 N.W. Third Street, Oklahoma City, Oklahoma, on the ..... day of June, 1975.

.....

Attorney for Respondent